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A European Half-Life? **A Retrospective on Joseph Weiler's *The Transformation of Europe***

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Abstract

Joseph Weiler's 1991 article, *The Transformation of Europe (TOE)*, was undoubtedly a landmark in European legal scholarship, but it also marked a watershed in its author's own approach to the European project. European legal scholarship was never the same after TOE, but nor was Joseph Weiler's contribution to that body of scholarship. In some ways, a shift in perspective is to be expected. TOE was an agenda-reshaping piece, and it is only natural that its author should follow the new agenda that he did so much to set. That is one part of the story. However, I believe that it is also the case that the author gradually came to understand the new agenda to be less relevant, or less 'actionable' than previously he had, and in any case less central, either because the world had simply moved on yet again in new and unpredictable ways, or, perhaps, because the agenda had never been as open as he once believed. In this retrospective comment, I explore both parts of the story. I examine what they tell us about the evolving character of supranational Europe as a political project and also as a field of inquiry, and how this movement is both reflected in and touched by the thought of one of the leading jurists of the age. In particular, I examine Weiler's post-TOE thesis of political Messianism as a way of accounting for both the early success and the recent loss of momentum of the EU. And in introducing the metaphor of the 'half-life' as the characteristic of an entity in irreversible decline, I address the following issues: whether and to what extent Weilers' views on the trajectory of Supranational Europe are consistent with such a metaphorical depiction; precisely what such a depiction entails in terms of the EU's prognosis; and how this approach might be challenged.

Keywords

Weiler, Supranationalism, EU, Peace, Prosperity, Messianism, Half-life, Community

A European Half-Life?

A Retrospective on Joseph Weiler's *The Transformation of Europe*

Neil Walker

Joseph Weiler's *The Transformation of Europe (TOE)*¹ was undoubtedly a landmark in European legal scholarship, but it also marked a watershed in its author's own approach to the European project. European legal scholarship was never quite the same after *TOE*, but nor was Joseph Weiler's contribution to that body of scholarship. In some ways, a shift in his perspective is to be expected. *TOE* was an agenda-reshaping piece, and it is only natural that its author should follow the new agenda that he did so much to set. That, indeed, is a large part of the story, but still only one part. It is also the case, I believe, that the author gradually came to understand the new agenda to be less relevant, or less 'actionable' than previously he had, and in any case less central, either because the world had simply moved on yet again in new and unpredictable ways, or, perhaps, because the agenda had never been as open as he once believed. In this retrospective comment, I want to explore both parts of the story. I want to examine what they tell us about the evolving character of supranational Europe as a political project and also as a field of inquiry, and how this movement is both reflected in and touched by the thought of one of the leading jurists of the age.

What was the new agenda? The originality of *TOE* lay in its deep diagnosis of the legal and political condition of supranational Europe. Previous legal scholarship had tended to adopt an insider line, taking the fact and the value of the post-war new European order for granted - as

¹ (1991) 100 *Yale Law Journal* 2403-2483

something to be affirmed, defended and incrementally developed as a 'good thing'. *TOE* told a more challenging tale. Drawing heavily on historical materials, and more lightly, but effectively, on contributions from the non-legal sciences of Europeanization, it presented a picture of European integration that was more dynamic but also more precarious and less insular than the received wisdom. According to the fresh narrative, legal supranationalism was no longer to be viewed as a mere projection and epiphenomenon of concerted 'high' political will, nor was it to be understood as somehow detached or sealed off from any immediate sense of political partisanship or contestation. One or both of these perspectives, each tending to situate law in an unproblematic and settled relationship with the 'political', were implicit in the dominant model of legal scholarship. In *TOE* the legal and the political domains were instead depicted as having long been in a relationship of complex, inverted symbiosis. The stepwise 'locking in' of robust legal supranationalism, measured in terms of increase in the authority, reach and enforcement capacity of European legal norms, was portrayed as both condition and reinforced consequence of weak political centralism, measured in terms of the maintenance of strong state-executive and so 'intergovernmental' control of the process of law-making at European level. Intergovernmental control went against the grain - or at least the long-term vision - of the more *communautaire* foundational texts of the Paris of 1951 and Rome of 1957, but had been vigorously re-asserted by Charles De Gaulle in the events leading up to the 1966 Luxembourg Compromise and its consolidation of the national veto over key European decisions.

Yet this relationship was already unravelling by the time it was diagnosed in *TOE*.² The Single European Act in 1987, soon to be reinforced by the 1992 Maastricht Treaty, had altered the subtle balance between strong legal authority and modest political capability at the European centre. The introduction of qualified majority voting in the area of the 'completion' of the single market and, progressively, in other flanking areas of social and economic policy, together with the gradual empowerment of the European Parliament as an actor in the legislative process, constituted an important if partial move towards *political* supranationalism or neo-federalism. This, in turn, meant that Europe was faced with a new set of possibilities, but also with a new set of dangers and constraints.

As Weiler sets out in the closing pages of *TOE*, Europe thus transformed was faced with new challenges of democracy and legitimacy, and the meeting of these challenges was bound to be further transformative. The development of majoritarian legislative authority at the centre raised the question of the deep democratic credentials of a wider Europe of such ample new political means. It did so as a matter of absolute standards, and, of more immediate consequence, it also did so relative to the much longer established more firmly embedded democratic claims of the member states themselves, whose independent authority was eroded or threatened by these centripetal forces. What is more, the combination of the aggressive promotion of the single market under the '1992' Programme and its relocation, post-Maastricht, within a deeper framework of Economic and Monetary Union, the palpable sense of a broadening of the supranational agenda to cover other, politically controversial and only loosely single-market-implicated areas of social policy such as internal security, defence and environmental policy, and the growing likelihood of national governments in power being

² Although Weiler had in fact developed the rudiments of the *TOE* thesis in an earlier article; see "The Community System: The Dual Character of Supranationalism" (1981) 1 *Yearbook of European Law* (1981) 267-306.

bound against their will by the accumulation of regulatory initiatives at the centre, meant that the legal-technocratic cloak of ideological neutrality which had long shielded the European project from political controversy looked increasingly threadbare. Europe now had to come to terms with the higher and more controversial profile of its common institutions. And in so doing, less reliance than previously could be placed on the loyalty, quiet diplomacy and pragmatic idealism of its officials, judges and various national fellow-travelling elites to drive its agenda and valorise its operations. In moving forward under these altered conditions, according to Weiler, Europe was faced with starker choices. It would take either the path of Unity - of federal statehood writ large, or, as he himself would prefer, and would claim to be the way more faithful to the European project's formative post-war ethos, of Community – of a novel and subtly balanced condition between internationalism and statehood.

This idea of Community had both 'hard' and 'soft' components. At its hard material and institutional end it was premised on a limited sharing of sovereignty, and a gradually thickening structure of policy and institutional interdependence. At the 'soft' cultural and ethical end, it was premised on the development of a new political sensibility and on the altered moral horizons associated with that new political sensibility; in particular, on the mutual complementarity of a bounded idea of national identity and a more inclusive sense of a continental identity of values and aspirations. In each dimension of Community, 'hard' and 'soft', the trick lay in finding a way of political being which, crudely, was neither too little nor too much. On the one hand, the new Europe had always been more than the mere instrument of its states, its value more than the aggregation and its authority more than the delegation of their various and separate self-interests. And in the exercise of its extended,

more transparent and more potentially state-antagonizing capacity, Europe would have to find ways to safeguard and justify that relative autonomy from its original sources of power. On the other hand, Europe would have to assert itself in a manner that did not destroy its own distinctive *raison d'être* as an accompaniment to rather than a new embodiment of the nation state, as an entity that qualified rather undermined, supplemented rather than supplanted, complemented rather than copied the constituent states of Europe.

So the new agenda set by *TOE* was one in which European law lost its rarefied, always/already quality. It was one where legal scholars not only were persuaded to take a greater interest in the historical origins of the European project as a way of understanding the contingency of the present and of accessing the framing conditions of a uncertain future, but also were drawn to address directly normative questions and institutional-design puzzles about the shaping of that uncertain future.

As already intimated, this agenda explains much of the trajectory of Weiler's own later work. The essays that formed the second part of his 1999 collection *The Constitution of Europe*³ – a collection in which, tellingly, *TOE* re-appears as the anchoring essay - were mostly taken from the post-*TOE* years. Much more than his earlier work, which, like *TOE* itself, tended to be concerned with diagnosis of the deep and distinctive structure of EU law (and, sometimes, as in his work on human rights, external relations or the free movement of goods, with its precise doctrinal implications),⁴ this later seam of writing was explicitly

³ (Cambridge, Cambridge University Press: 1999), chapters 6-10. For my Review, see "All Dressed Up" (2001) 21 *Oxford Journal of Legal Studies* 563-82.

⁴ See Weiler n3, chapters 3 and 4 on human rights and external relations respectively. On the free movement of goods, see his, "The Constitution of the Common-Market Place: Text and Context in the Evolution of the Free Movement of Goods", in P. Craig and G. de Búrca *The Evolution of EU Law* (Oxford, Oxford University Press: 1999, 1st edition) 349-375.

normative. In particular, it was concerned to explore and deepen what Weiler meant by his preference for Community over Unity, and to do so both in 'hard' and 'soft' terms. It was the work in which he addressed the challenge of revitalizing the congealing values of Peace and Prosperity, which he had identified as constituting the ethical heart of the original project of a continent devastated by war; in which he argued for supranational democracy as a vital but, finally, instrumental good of the continental polity - empty without a reinvestment in core values; in which he developed his ideas about the 'taming' rather than replacement of national by European identity – the one concerned with the retention of that culture of originality and belonging inextricable from and vital to primary political community at the state level, the other inhabiting a more cosmopolitan and so other-regarding sensibility; and in which he began to develop his notion of Tolerance, and in particular national tolerance of and *self-discipline* before the supranational edifice and its wide-ranging normative message as to the acceptance of the non-national 'other', as the lodestar of European constitutionalism – an argument which would come to form part of his later powerful opposition to the top-down imposition of a documentary Constitution for Europe against the backdrop of the failed constitutional initiative of 2003-5.⁵

Yet this is only one part of the story, and essentially the first part. In more recent years the writings of Weiler, always a healthy corrective to unthinking Euro-complacency or glib Euro-optimism, have taken a more pessimistic turn. Where once Supranationality, offered in the upper case as the animating structural ideal - the 'x' factor of integration - supplying both the institutional hardware and the ethical software for the substantive ideals of Peace and

⁵ See e.g. Weiler, "A Constitution for Europe? Some Hard Choices, (2002) 40 *Journal of Common Market Studies* 563; "On the Power of the Word: Europe's Constitutional Iconography" (2005) 3 *International Journal of Constitutional Law* 173-90.

Prosperity,⁶ was an elusive yet preciously defining feature of the European *Sonderweg*, now it began to look plain elusive. For the tension that Weiler identified with such acuity in *TOE* between too much and too little - between preventing the excesses of a new Unity on the one hand and avoiding a failure of Community to renew its credentials under conditions of greater political capacity, increased public profile and more diverse and more insistent political challenge on the other, now threatened, in his eyes, to collapse into a series of intractable problems.

In particular, a much emphasised and recently repeated theme of his post-*TOE* work has been the difficulty of replacing or replenishing the original motivational ideals of Prosperity and Peace in a time of relative plenty, however unevenly distributed, and in a place where the sound of War is now only heard from beyond its borders.⁷ In seeking to demonstrate this loss of momentum, Weiler is critical, and not without reason, of the stubborn lack of clear and democratically sensitive lines of accountability within the European institutional balance, of the sustained absence of true political contestation at the European level, and of the stark contrast between the ebbing of popular interest and participation in European elections and the ever greater mobilisation of national support behind profoundly anti-European parties. If this echoes a common catalogue of complaint, Weiler has also, more distinctively, been critical of what he sees as a gradually hardening deficit of effective political capacity and resolve on the part of the EU's leading institutions. This failure, for him, was manifest, for example, in the EU's ineffectual response to conflict amongst its near neighbours - in particular to humanitarian crises in Bosnia and Kosovo, and, more recently, in its absence

⁶ See Weiler, n3 chapter 7; "*Fin de Siècle* Europe: do the new Clothes have an Emperor?"

⁷ See in particular Weiler "60 Years since the First European Community- Reflections on Political Messianism" (2011) 22 EJIL 303-311; "The Political and Legal Culture of European Integration: An Exploratory Essay (2011) 9 *International Journal of Constitutional Law* 678-694; "In the Face of Crisis: Input Legitimacy, Output Legitimacy and European Integration" (2012) 34 *Journal of European Integration* 825-841.

from the top table in respect of intervention in Libya, and its reluctance to make common cause of the problems generated by the pressure of mass immigration from Northern Africa. And, of course, more topically still and most urgently of all, this lack of resolve has also been evident in the EU's repeated failure to contain or reverse its rapidly escalating and widely ramified sovereign debt crisis. Importantly, however, unlike so many other analyses, for whom the current parlous state of the Union is quite distinct in profundity from anything that preceded it and essentially rooted in macro-economic factors, for Weiler, without in any way seeking to underplay the significance or urgency of the threat to economic and monetary union, the immediate crisis is instead viewed as essentially *continuous* with a longer and broader pattern of *political* impotence.

Weiler sees the accumulation of democratic ills and of decision-making black spots and policy haemorrhages as deeply symptomatic of political drift, as a running indictment of a failure to meet the challenge of political renewal which the 1990s – the original age of transformation – presented in such stark form. And this critique is underscored by two additional sceptical themes, both of which focus on the limitations of the ‘hard’ institutional side of the formula for Community. On the one hand, for all that he is critical of the failure of the European architecture to adapt to new challenges, there is an abiding concern in Weiler’s work to avoid just the kind of institutional overreach that would either intentionally pursue or unintentionally stumble upon the ‘wrong road’ of European Unity or statehood. Whenever the reassertion of supranational Europe is seen to involve the accoutrements of statehood, whether a written Constitution, or an unqualified sense of the supremacy of European law, or any arrangement which would elevate European citizenship above national citizenship in

Europe's complex matrix of democratic connections, the fear is expressed that this goes too far, if not necessarily in the deed or likely consequence then certainly in the hubristic intent. On the other hand, there is a sense that the ills of Europe have become so much "part of a deep-seated political culture"⁸ that they are in any case simply not susceptible to treatment through institutional arrangements; or, in a milder version, that institutional reforms significantly *underdetermine* the possibility of genuine transformation which would allow supranational Europe to recover its sense of political purpose.⁹

By the same token, Weiler does not offer any alternative blueprint to resolve what he sees as the ills of Europe. In his work, from *Un'Europa Cristiana*¹⁰ onwards, on the complex relationship between political values and individual virtue, and in particular the failure of the values and structures of political supranationalism to provide a context for the inculcation of the very virtues which would allow the sustained realization or renewal of these values, there is much reflection on how the 'soft' ethical side of the problem of Community is key, and how it must be addressed in its own terms. The danger here, however, is that the diagnosis, even if correct – or, at least, to the extent that it is correct – is simply left hanging, suggesting no obvious course of treatment beyond the kinds of institutional reforms he either resists or treats as of secondary importance.

⁸ "60 Years Since" n7, 309.

⁹ On one interpretation of his early post-TOE work, Weiler reads like an institutional conservative; as someone who, in his own words, approaches the European constitutional design with the attitude, 'if it ain't broke don't fix it', and who is of the view that it 'ain't (yet) broke'. See Weiler, "Fischer: The Dark Side" in C. Joerges, Y. Meny and J.H.H. Weiler (eds), *What Kind of Constitution for What Kind of Polity? Responses to Joschka Fischer*. (Florence: Robert Schuman Centre, 2000). This, however, would in my view be a false reading, or at least an exaggerated one. His conservatism extends only to the basic Supranational ideal, and to what he understands as vital to the maintenance of that ideal, including the promotion of the idea of Tolerance, and the avoidance of Big 'C' constitutional solutions. As his consistent critique of the democratic deficit and as his frequent proposals for reform make clear, he has always been interested in institutional redesign, even if he sees this as only a modest part of the answer to Europe's problems. See e.g. Weiler n3. Chapter 10; "To be a European Citizen: Eros and civilization"

¹⁰ *Un' Europa Cristiana: Un saggio esplorativo* (Milan:Rezzi, 2003)

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It is this concern which lies behind the headline of my piece. 'Half-life' is a scientific term denoting the period of time it takes a substance undergoing irreversible decay to decrease by half, and is sometimes used more loosely to depict the condition of terminal decay itself. But I approach this stylisation tentatively. The question mark in my title reflects a series of genuine uncertainties. First and foremost, over whether, for Joseph Weiler, Europe today has, indeed, entered or may be on the verge of entering the half-life phase. Is the future of supranational Europe already or in danger of becoming one of irreversible decline, or, put less sensationally, at least one of diffusion, defusion, dilution, fragmentation - of mutation into something that is no longer recognisably Big-S Supranational?

And insofar as Weiler's work does contemplate the half-life thesis, further exploration is required to clarify what this means in terms of both prognosis and diagnosis. As to prognosis, even if the canonical post-war form of the European project is in secular decline, this need not imply either the expectation of or a preference for a clearly distinct geopolitical solution on the one hand, or a dystopian outcome on the other. Weiler is no flat-earth nationalist, nostalgically hankering after, still less anticipating a return to the 'Westphalian' paradigm of mutually exclusive states. His earlier enthusiasm for and pioneering justification of the supranational project makes that perfectly clear. Equally, unlike those who would view the EU's 'natural' evolution as tending towards a more inclusive and less regionally delineated complex of planetary regulation, he is no champion of ambitious models of global governance in which cosmopolitan optimism somehow trumps the opposing dangers of renewed Great Power imperialism or rudderless fragmentation. Instead, the Supranational paradigm understood as a *singular* achievement - according to which there is a common trajectory of integration in which all national polities share the same institutions and embrace

the same culture of indefinite common commitment - may simply be exhausted, with no clear option either of reversion or of succession. The sense conveyed by Weiler's recent work, then, is that the age of Supranationality as a sufficient or even still a relevant model either for the European continent itself, or, as has often been urged or assumed, for other regions and other operations of transnational governance, may be drawing to an end,¹¹ and with no other political vision readily equipped to take its place.

Yet, even if, in this reading of Weiler, both steady state Supranationalism and its starkest alternatives are ruled out, that does not mean that we would be left only with a residual half-life narrowly and negatively conceived - involving nothing more than the gradual corrosion and reduction of Europe's dense and complex structure of transnational governance. Over the longer term, if we take a more optimistic view, novel vocabularies of legitimation and new expressions of collective self-authentication can often be found for emergent forms of political practice which are hardly recognised and reckoned for their novelty before the new terms are coined. For history teaches us that it is a paradoxical, Owl-of-Minervan feature of much transformative social and political change that forward-looking reflection and imagination is fired by the stirrings of new practice rather than offering its prior inspiration. This is a point, indeed, that Weiler himself once strikingly insisted upon in characterising the nascent Supranational Community of the 1950s and 1960s itself as a case of Doing before Harkening¹² - as a series of experimental steps which only gradually discovered and revealed their deeper purpose and direction. In the recent revival of a tentative and, admittedly, still normatively impoverished language of multi-speed

¹¹ See my exchange with Weiler on the subject of my essay "The Place of European Law" (57-104) in G. De Burca and J.H.H. Weiler *The Worlds of European Constitutionalism* (Cambridge, Cambridge University Press: 2012). See esp. "Dialogical Epilogue" 270-278, where he questions the continuing significance of the EU as a global archetype.

¹² Weiler, n3, chapter one, "Introduction: 'We all do, and hearten'"

Europe - of flexible or differentiated Europe - we may see something similar unfolding.¹³

We may observe the beginnings of a process by which today's profoundly challenged Supranationalism may come in time to be understood and articulated as mutating into a new and differently legitimated political form

Alternatively, if we focus instead on more pressing short-term realities, we may draw a less optimistic and more sobering conclusion. One of the salutary lessons of the current, already long-extended Euro crisis, with its progressively destabilising disconnect between a common monetary policy that produces highly selective economic hardship and a fiscal policy which lacks either the common pan-European means and commitment or the sufficiently other-regarding resolve of the richer states to supply a more solidaristic solution, is that institutions do not readily disappear or transform themselves just because they become temporarily or even persistently dysfunctional. Repeated self-reassertion, in the manner of the extensive range and breathless pace of elite institutional initiative we have witnessed over the crisis years,¹⁴ may be no prelude to renewal or to any kind of orderly mutation. Rather, it may simply signal obliviousness to or denial of the onset of half-life - the dangers of which I return to in the conclusion.

Before that, however, we need to attend to Weiler's deeper historical diagnosis of the present condition, for this reinforces the sense in his later work of the fading of the Supranational paradigm as a matter of waste and atrophy rather than as a productive morphosis. Of key significance here are his views about the "messianic"¹⁵ origins of the Union. Weiler contends, using the Schumann Declaration as Exhibit One, that the fact that

¹³ See e.g. J-C Piris *The Future of Europe: Towards a Two-Speed EU?* (Cambridge: Cambridge University Press, 2012).

¹⁴ From a huge literature, see e.g., the recent special issue of the *European Law Journal* edited by Damian Chalmers for comprehensive documentation and incisive analysis; Volume 18, Issue 5, September 2012.

¹⁵ See e.g. "Sixty Years Since" n7, 306.

certain ideals - Peace and Prosperity again – were at the centre of the original European project, both encouraged and was encouraged by a kind of top-down single-mindedness and infallibility of purpose amongst a core group of post- War European leaders.

Even if we do not fully buy into the Messianic metaphor of the Promised Land for an entity which has so often, and with good reason, been accused of bureaucratic distance and of failure to ignite the passion of genuine commitment amongst the populations of its member states, Weiler is certainly correct in identifying a strongly teleological element in the initial European project. In fact, rather than contradictory forces, elite-led passion and a quotidian culture of unobtrusive, technocratic rule and quiet compliance might be said to be naturally complementary dimensions of a vast socio-political project of such early settled purpose. Taken together, moreover, these different features of teleological rule - both the impassioned grand vision and the minutely reasoned detail - reflected and cultivated a sensibility which, from the early days, stood against contestatory democratic openness and allowed only grudging recognition to those market-correcting rights-claims that might temper the preconceived economy-centred project. Yet, it might be argued, just such a background of a more ample democratic culture and a more pluralist menu of basic goods might have served the EU better as it entered its transformative phase in the late 1980s.

Weiler's own take on the absence of democracy from the early EU, in fact, turns out to be even more critical than this. His message seems to be less one of missed opportunity than of genetic limitation or disability. He claims that "if political Messianism is not rapidly anchored in the legitimation that comes from popular ownership, it rapidly becomes alien ...

and turns on its creators.”¹⁶ Does this mean, perhaps, that by the time of 1992 and all that it was already too late for the EU to legitimise its inevitable spurt of post-foundational expansion and transformation? But given that, for Weiler, the messianic or teleological element is also at the root of all that is distinctively good in the EU, namely the commitment to Peace and Prosperity in an other-regarding transnational environment – was there ever a moment where it would have been possible, even in principle, to introduce democracy *early enough* to ensure that a narrow Messianism, or teleological perspective, did not take hold, but not *so early* as to destroy the momentum and sense of common cause without which the founding ideals would have been frustrated? In other words, perhaps on Weiler’s analysis the EU was damned to an early grave – a half-life of inexorable deterioration – if it did democratise and diversify its basic goods, and equally damned if it did not.

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These points, to repeat, are made tentatively. I merely speculate upon the reasons for and implications of what is a distinct shift in tone and perspective from the more open sense of normative possibilities Joseph Weiler set out in his path-breaking *TOE* agenda, and as to the extent and precise implications of that shift. Perhaps, though, the half-life metaphor oversteps the mark. After all, natural science has no place for the contingencies of human agency, and for that reason has never been the best model for the study of politics and society. And if the very point of the half-life metaphor is to suggest that the path-dependent pathologies of Europe’s Supranational project may simply be beyond human remedy, we must beware its ‘scientific’ capacity to reduce and distort.

¹⁶ *Ibid* 308.

Two further points might be made in clarification of Weiler's mature post-*TOE* position, each of which underlines the need to treat the half-life metaphor with great caution as a characterisation of his later work. First, the weight of his analysis has been on the past and present rather than the future - on the lessons of diagnosis rather than the vagaries of prognosis. Before we ask what is to be done, we must work out why things are as they, and if in so doing we offer no comfortable sense either of continuity or of evolution, then that stands, not as a blanket denial of the possibility of a better future, but merely as an important warning against complacency to those in the futures business. His priority has been to demonstrate why and how the EU of today, and so also the EU of tomorrow, has been reduced to a more precarious state than many of its supporters have in recent years typically been prepared to concede, and who can say that approach has not been vindicated by the onset of the current crisis.

Secondly, we should not forget that, for all he sees the European project as having eclipsed the selfish concerns of its member states, Weiler retains a distinction between generative authority and ethical purpose. For him, Supranationality was a national production which came to transcend national self-interest. Equally, his wariness about new institutional solutions at the European level is not just a product of a general institutional scepticism, but also of a more particular scepticism about the capacity of European institutions to provide the fulcrum of change when the wellsprings of legitimacy remain so firmly located in the cultural heartlands of the individual states. If Europe is to be made anew, then for Weiler the onus will once again lie with "the national communities as the deepest source of legitimacy of the integration project."¹⁷ On that view, the inescapability of failure, and of its accompanying half-life, is only plausible within narrow parameters; namely, to the extent that we cleave to

¹⁷ "In the Face of Crisis" n7 837.

the belief that the Union can be *self*-transformative rather than requiring to revert to its founding parents in times of trouble.

My own view, on which I have exchanged views with Joseph before,¹⁸ is somewhat different. I believe that that there *is* more that we can do from the hard institutional side to create the political-cultural wherewithal to pursue common continental goods; that these may not be *manifest* common goods like Peace and Prosperity - so self-evident that they do not require legitimisation or discovery by democratic means, but rather *constructed* common goods – generated through mechanisms of voice and decision at the continental scale;¹⁹ that these processes need not tend towards a new Unity, nor even significantly endanger remaining national processes of will formation; and that the process which led to the failed Constitutional Treaty, far from an irrelevance or a hubristic conceit, was actually a missed opportunity to generate a broader debate and develop a broader commitment to a 'post-Messianic' EU. This is not the place to debate these matters more fully, or to consider whether now might be a riper time than the pre-crisis mid-noughties for a process of constitutional mobilisation, but merely to acknowledge that my views involve a degree of speculation in extending faith in the transnational political process, just as Weiler's involve a degree of speculation in the curtailment of that faith.

What is not a matter of speculation, however, is that the political backdrop of 2013 is not that of 1991, but an even more challenging one. In *TOE*, Weiler thought it worthy of remark, so well-entrenched was the Union by then, that “as recently as the late 1960s, the

¹⁸ See "Dialogical Exchange" n11.

¹⁹ See my "The Place of European Law" n11 esp. 90-95.

survival of supranationalism was a speculative matter"²⁰. He set his transformative agenda, therefore, against a backdrop of political flux but also long-term security. Today, no-one would doubt that the threat to survival is, finally but firmly, back on the political radar,²¹ however unlikely that might have seemed in the intervening years. Equally, however - and this is one final way in which the half-life label might be useful - the return of a deep-set fear of demise generates its own counterpoint. Weiler is sensitive to this, singling out those prominent members of the current European elite, institutional heads and key national leaders alike, who have played and continue to play on the sense of crisis so as to encourage a one-way climate of "integration through fear".²² Without the Euro and all its works, it is proclaimed from these influential quarters, the EU simply cannot survive - a perspective which purports to justify the unprecedented range of urgent measures of "executive federalism"²³ we have witnessed in the last two years of Treaty and non-Treaty reform. Yet, as Weiler claims, this is an argument from *false* necessity. It is a means by which widespread unease about European decline is exploited to assert, in denial of such decline, first, that there is only one cure - the preservation of the old order, and, secondly, that there is only one potent medicine for that cure - the bitter medicine of monetary constraint and fiscal discipline.

If Europe as a political project is in doubt, what of Europe as an intellectual project? Can we imagine any contemporary cross-disciplinary work on the European Union having

²⁰ n1, 2406.

²¹ In his annual State of the Union speech on 28th September 2011 the current President of the Commission was moved to state that "We are today faced with the greatest challenge our union has known in all its history".<http://www.reuters.com/article/2011/09/28/us-eu-barroso-idUSTRE78R0WG20110928> It is testimony to how widespread the language of crisis has become in such a short time-frame that what appeared unprecedented in its candour only two years ago has so quickly become unremarkable, even commonplace, in EU institutional discourse.

²² Weiler, "Integration through Fear" (2012) 23 EJIL 1-5.

²³ See e.g. J. Habermas *The Crisis of the European Union: A Response* (Cambridge, Polity: 2012).

the kind of (re)framing influence and lasting impact enjoyed by *TOE*? A *TOE* 2013-vintage, if such a project were to be attempted, would be written from a decidedly more precarious place than that occupied by Joseph Weiler in 1991. It is a project that, to succeed, would require at least as much historical sensitivity and perspicacity as its illustrious predecessor, and perhaps even greater foresight.